Supreme Court, U.S.
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No. 88-1652

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

ROGER EMERICK,
Petitioner,

v.

WALTER BORDEN, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For Respondents
Walter Borden, et al.:

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF CASE 1

ARGUMENT 2

CONCLUSION 4

TABLE OF AUTHORITIES

Cases: **Page(s)**

Beckman v. Talich Homes, 190 Conn. 299 (1983) 3

Benson v. Morey, 129 Conn. 390 (1942) 3

Boucher Agency, Inc. v. Zimmer, 160 Conn. 404, 409 (1971) 2

Cersosimo v. Cersosimo, 188 Conn. 385, 393 (1982) 3

Conference Center Ltd. v. TRC, 189 Conn. 212 (1983) 3

Hartford National Bank & Trust Co. v. Difazio, 177 Conn. 34, 39n (1979) 3

Shuster v. Buckley, 5 Conn. App. 473, 479 (1985) 3

Webb v. Webb, (1981 U.S.) 68 L. Ed. 2d 392, 101 S. Ct. 1889 2

Wilson v. Loew's Inc., 355 U.S. 597 (1957) 2

Yazoo and M.R. Company v. Adams, 180 U.S. 41, 45 L. Ed. 415, 21 S. Ct. 256 2

Other Authorities:

Connecticut Practice Book Section 384 2

STATEMENT OF CASE

Petitioner originally brought this action against the respondents alleging that the respondents failed to exercise proper skill and care in performing an evaluation to be used in a court-ordered custody study involving the petitioner, his then spouse, and their minor child. The respondents filed a Motion to Strike the Complaint on the grounds that the Complaint failed to allege facts supporting the existence of a physician-patient relationship. The petitioner ultimately filed an Amended Complaint wherein he alleged that he "believed that a physician-patient relationship existed." Respondents, in their Answer to Amended Complaint, neither admitted nor denied the allegation referring to the petitioner's "belief" that said relationship existed.

The respondents, thereafter, filed a Motion for Summary Judgment with supporting affidavits and other documentary evidence.

Although the lower court attempted to extend to the petitioner the greatest latitude in its examination of the Amended Complaint, the court held that the absence of facts supporting the existence of a physician-patient relationship was crucial and granted respondents' Motion for Summary Judgment which was sustained by the Connecticut Appellate Court and the Connecticut Supreme Court.

ARGUMENT

I. THERE WAS NO SUBSTANTIAL FEDERAL QUESTION RAISED IN STATE COURT.

The Supreme Court's jurisdiction to review a state court decision under 28 U.S.C.S. Section 1257, whether by appeal or certiorari, is dependent upon the presence of a federal question in the case. The petitioner has failed to specify at what stage in the proceedings below a federal question was raised, how it was raised, and how passed on by the lower court. *Webb v. Webb,* (1981 U.S.) 68 L. Ed. 2d 392, 101 S. Ct. 1889.

The Petition contains the Memorandum of Decision on Motion for Summary Judgment granting defendant-respondents' Motion based on the failure to allege facts supporting a physician-patient relationship. Said decision properly sets forth the lower court's reasoning and application of existing state law and procedure. The petitioner has made no showing that said judgment rendered in the court below could not have been given without deciding a federal question which would, thus, give the United States Supreme Court jurisdiction under 28 U.S.C.S. Section 1257. *Yazoo and M.R. Company v. Adams,* 180 U.S. 41, 45 L. Ed. 415, 21 S. Ct. 256.

It is well accepted that this Court will not review a decision of a state court resting upon adequate and independent nonfederal grounds. The respondents submit that the judgment entered by the state court in this case was based on adequate law and procedure. *Boucher Agency, Inc. v. Zimmer,* 160 Conn. 404, 409 (1971); *Wilson v. Loew's Inc.,* 355 U.S. 597 (1957); Section 384, Connecticut Practice Book.

Further, the Memorandum of Decision of the Trial Court, included in the Petition, evidences the fact that the lower court gave the petitioner-plaintiff every latitude in examining the Complaint. (See pg. 7A of Appendix to Petition for Writ of Certiorari.)

II. THE GRANTING OR DENIAL OF PETITIONER'S MOTION TO AMEND AND FILE SUBSTITUTE COMPLAINT WAS WITHIN THE DISCRETION OF THE TRIAL COURT AND WAS PROPERLY REVIEWED UNDER STATE LAW.

The petitioner cites a number of Federal Appeals Court cases which deal primarily with premature dismissals of complaints by inmates, or application to a lower court seeking to enjoin enforcement of state criminal statutes.

The *Emerick* case is a civil action. The Appellate Court appropriately reviewed the chronology of the pleadings in the case in considering whether the lower court abused its discretion and found no error under existing law and procedure.

There was adequate and independent nonfederal grounds upon which the Connecticut Appellate Court could and did find no error. *Benson v. Morey*, 129 Conn. 390 (1942); *Shuster v. Buckley*, 5 Conn. App. 473, 479 (1985); *Conference Center Ltd. v. TRC*, 189 Conn. 212 (1983); *Beckman v. Talich Homes*, 190 Conn. 299 (1983).

In the case below, the pleadings were closed as of June 17, 1986. Plaintiff moved to amend and file substitute complaint on June 11, 1987, or almost one year after the pleadings were closed and after the trial court granted defendant-respondents' Motion for Summary Judgment. Respondents acknowledge that it has been the court's established policy to allow great latitude to a litigant who, either by choice or necessity, represents himself in legal proceeings, so far as such latitude is consistent with the just rights of any adverse party. Such a litigant is bound by the same rules of evidence and procedure as those qualified to practice law. Respondents further submit that there was, in fact, no deprivation of petitioner's rights under state law. *Cersosimo v. Cersosimo*, 188 Conn. 385, 393 (1982); *Hartford National Bank & Trust Co. v. Defazio*, 177 Conn. 34, 39n (1979).

CONCLUSION

Since the decision in this case was based on adequate and independent nonfederal grounds, and every latitude was given to the petitioner, and there has been no showing that a substantial federal question was raised and passed on by the Connecticut court, the Petition should be denied.

Respectfully Submitted,

Respondents, Walter Borden, et al.

By GERALD R. SWIRSKY of
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WILLIAMS